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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN WILLIAM STENZ, Appellant.	2 CA-CR 2008-0182 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200100798

Honorable Donna Beumler, Judge Pro Tempore
Honorable James L. Conlogue, Judge

VACATED AND REMANDED

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H O W A R D, Presiding Judge.

¶1 Pursuant to a plea agreement, appellant John Stenz was convicted of one count of attempted aggravated driving while under the influence of an intoxicant (DUI) and one count of driving with a suspended driver's license. The trial court suspended imposition of sentence and placed Stenz on probation, which it later revoked. On appeal, Stenz contends the trial court erred in revoking his probation because the directive he allegedly violated was vague and not specifically in writing. We agree and therefore vacate the trial court's finding that Stenz violated the conditions of his probation.[1]

¶2 We view the facts in the light most favorable to sustaining the judgment of the trial court and resolve all reasonable inferences against the defendant. *State v. Jones*, 188 Ariz. 534, 537 n.1, 937 P.2d 1182, 1185 n.1 (App. 1996). Stenz was charged with aggravated DUI and aggravated driving with an alcohol concentration of .08 or more, both while his license was suspended or revoked. He pled guilty, pursuant to a plea agreement, to attempted aggravated DUI and driving with a suspended license. The trial court accepted the plea, suspended imposition of sentence, and placed Stenz on three years' probation.

¶3 Stenz's probation supervision was eventually transferred from Arizona to North Carolina. Soon after, Stenz requested permission to move to California. While in California, Stenz received a letter from his probation officer, dated September 24, 2003, which stated:

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[1]Because Stenz's probation should not have been revoked and he has therefore been improperly incarcerated for nearly a year, unless the state objects, the court would entertain a motion to expedite the mandate in this case.

> Due to your failure to make Court-ordered monthly payments, I cannot petition the Court to have you placed on unsupervised status. Our department has received direction from our supervising agency at the Arizona Administrative Office of Courts to have anyone that is currently out of state on a travel permit to return to their sending state immediately. The State of California has not responded to several requests for transfer of your case to California. I no longer have any choice in this matter. I must file a Petition to Revoke your probation with the Court and request a Bench Warrant for your arrest. You need to be aware the warrant will be an ACIC only warrant which means the warrant is valid only if you are in the State of Arizona. If [you] have any questions, please call me."

¶4 Stenz did not respond to the letter and did not return to Arizona. Stenz's probation officer subsequently filed a petition to revoke his probation, alleging that Stenz had "failed to obey a lawful order of his supervising probation officer by failing to return to the State of Arizona as ordered." Following a violation hearing, the trial court found Stenz had violated his probation conditions and determined that the September 24 letter could be "reasonably construed as an instruction or an order or a directive to the probationer that, unless you come back [to Arizona], you're in violation" of probation. The trial court revoked Stenz's probation and sentenced him to a presumptive, 1.5-year prison term.

¶5 On appeal, Stenz contends that he did not violate the conditions of his probation because he "was never given a lawful order" and the "sole allegation in the Petition" to revoke probation was that he had failed to obey a lawful order of his probation officer by failing to return to Arizona from California. Normally, we review a trial court's finding that a probationer has violated probation for an abuse of discretion. *See State v.*

Sanchez, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973) ("[T]he revocation of probation has always been deemed to lie within the sound discretion of the trial court."). Here, however, it is an issue of law whether the September 24 letter constitutes an order that Stenz return to Arizona. We review issues of law de novo. *See State v. Smith*, 219 Ariz. 132, ¶ 10, 194 P.3d 399, 401 (2008).

¶6 Rule 27.8(c)(2), Ariz. R. Crim. P., provides in part: "Probation shall not be revoked for violation of a condition or regulation of which the probationer has not received a written copy." The purpose of this requirement is to "reduce evidentiary disputes over what probationers are told and to protect probationers against probation officers' arbitrary acts." *State v. Robinson*, 177 Ariz. 543, 544, 869 P.2d 1196, 1197 (1994).

¶7 In *Robinson*, the defendant's probation conditions required that he complete any counseling program selected by his probation officer. *Id.* at 543, 869 P.2d at 1196. Robinson admitted his probation officer had orally instructed him to complete a particular program but he had decided not to do so. *Id.* at 544, 869 P.2d at 1197. Our supreme court found that the initial condition of probation requiring Robinson to attend counseling programs was insufficient to satisfy the written-order requirement of Rule 27. *Id.* The court determined that an order, even if written, is insufficient to support the revocation of probation if it "does not specifically tell the defendant what he must do" or if it fails to give the trial and appellate courts "guidance as to what the defendant was supposed to do." *Id.*; *see State v. Alves*, 174 Ariz. 504, 506, 851 P.2d 129, 131 (App. 1992) ("A violation of

probation must be willful," and the "violation of a rule which a probationer is not, and could not be expected to be aware of[] will not support a revocation of probation."). The court then held that Robinson's probation could not be revoked because the order he had violated was not in writing. *Id*. at 546, 869 P.2d at 1199.

¶8 The September 24 letter to Stenz does not contain an express order that he return to Arizona and is therefore insufficient to support the revocation of his probation on the ground of failure to comply with an order of a probation officer. The letter states that the probation department has been told "anyone that is currently out of state on a travel permit" must return to Arizona. But it also states that Stenz has failed to make his monthly payments and that the probation officer has no choice but to file a petition to revoke his probation and request a bench warrant. A petition to revoke probation and a request for a bench warrant could only be properly filed if Stenz had already violated his probation conditions, as opposed to his having a chance to comply with an order by returning to Arizona. And the letter does not order or tell Stenz "specifically . . . what he must do" upon receipt of the letter. *Id*. at 544, 869 P.2d at 1197.

¶9 Stenz's probation officer also admitted that the letter was poorly written and testified that it contained no "verbiage" ordering Stenz to do anything. The officer also testified that he did not understand the letter and agreed it could be interpreted as either "a statement of what [the probation] department has been ordered to do, or . . . [as] an order to Mr. Stenz . . . depend[ing] on how you read it." Accordingly, because the September 24

letter contains no written order, we conclude the trial court erred in revoking Stenz's probation for failure to comply with an order of his probation officer.

¶10 The state contends, however, that, even though the letter does not explicitly order Stenz to do anything, it could nevertheless be construed as "direct[ing Stenz] as to what he needed to do." But even if we assume, arguendo, that the letter could be construed as directing Stenz to do something, that direction is not explicit but merely implied. This is precisely the type of dispute the *Robinson* requirement is intended to avoid. Accordingly, because the probation officer's letter of September 24 did not "specifically tell [Stenz] what he must do" and similarly gives this court no "guidance as to what [Stenz] was supposed to do," Stenz could not have been expected to comply with it, and the trial court incorrectly revoked his probation for failure to comply with an order of a probation officer. *Id*. at 544, 869 P.2d at 1197.

¶11 In its answering brief, the state argues that the *Robinson* court's "passing reference to whether written notice 'specifically t[old] the defendant what he must do' is . . . dictum" and a written order therefore need not specifically tell a defendant what he must do. But the requirement that a probation officer's written order "specifically tell the defendant what he must do" is not dictum but rather an explanation of Rule 27's requirement and of *Robinson*'s holding that general written notice of a probation requirement is insufficient to support the revocation of probation for failure to obey a specific order. 177 Ariz. at 544-45,

869 P.2d at 1197-98. Accordingly, the letter cannot serve as the basis for revoking Stenz's probation for failure to obey an order.

Conclusion

¶12 In light of the foregoing, we vacate the trial court's finding that Stenz violated his probation and remand the case for further proceedings consistent with this decision.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge